

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8704

190

CONSUMERS UNION OF U. S., INC.,
Appellant,
against

FRANK J. WALKER, Postmaster General of the
United States,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OSMOND K. FRAENKEL,
ABRAHAM J. ISSERMAN,
UNITED STATES PAUL J. KERN (in the armed services)
COURT OF APPEALS FOR THE 76 Beaver Street,
DISTRICT OF COLUMBIA Borough of Manhattan,
City of New York,

FILED MAR 16 1944

HORACE S. WHITMAN,
815 15th Street, N. W.,
Washington, D. C.,

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CLERK

Attorneys for Appellant.

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IN THE

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FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U. S., INC., Appellant, against FRANK J. WALKER, Postmaster General of the United States, Appellee.	}	No. 8704
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLANT

Jurisdictional Statement

This is an appeal by Consumers Union of U. S., Inc., plaintiff below, from the judgment and order entered herein in the District Court of the United States for the District of Columbia on January 21, 1944 (Appellant's Appendix, p. 10). Notice of appeal herein was duly filed on February 3, 1944, and an agreed deposit for costs made on February 3, 1944.

Jurisdiction of this Court is derived from 17 U. S. C. A., §38 (35 Stat. 1084), and Code, D. C. 1940, §17.101 (41 Stat. 1312).

Statement of the Case

Appellant is a non-profit membership corporation engaged in the business of informing its members concerning

the quality of various articles of merchandise offered for sale. In the course of its business it publishes a regular monthly report and, from time to time, publishes pamphlets dealing with special subjects. This case involves one of such pamphlets, a pamphlet dealing with contraceptive materials. (It is bound in on page 5 of Appellant's Appendix.)

The suit was begun in October, 1943 in the District Court of the United States for the District of Columbia for the purpose of enjoining the Postmaster General of the United States from enforcing an order made by him which bans this pamphlet from the mails.

The pamphlet in question consists of a detailed report concerning various methods used to prevent conception and various materials sold for that purpose, with specific ratings of particular products specified by name or manufacturer. The ratings are under the headings "Acceptable" and "Not Acceptable". This pamphlet was not distributed to the general public, nor even to the general membership of plaintiff. It was distributed only to persons who specifically requested the same and signed a statement to the effect that they were married and had been advised by their physicians to use contraceptive materials.

The complaint alleges that large quantities of the materials referred to in the pamphlet are publicly and legally sold throughout the United States and that it is the purpose of plaintiff to enable those of its members who are properly using these commodities to make a proper choice from among the variety offered in the market. The complaint further sets forth the various steps taken in the Post Office Department which resulted in the order banning this pamphlet from the mails. It is apparent that plaintiff has exhausted its administrative remedies. The complaint finally alleges that the action of the defendant in banning this pamphlet from the mails was arbitrary, in excess of the authority vested in the department under the law and in violation of plaintiff's rights under the First Amendment to the Constitution.

Defendant's motion to dismiss rested entirely upon the proposition that judicial review of orders of the Postmaster General is not permissible unless the decision was plainly erroneous. With this proposition and the cases cited in the memorandum accompanying the notice plaintiff has no quarrel. Plaintiff contends, however, that the argument is irrelevant to the particular case. For it is evident that if the pamphlet does not, as a matter of law, come within the ban of the statute, then there is no discretion in the Postmaster General to ban it and no presumption can attach to his acts. Whatever presumption may attach to a finding of the Postmaster on a question of fact, it is respectfully submitted no such presumption can attach to the Postmaster's interpretation of the law. On that subject the courts have the last word.

In any case whether or not there is any presumption which attaches to a ruling by the Postmaster General on questions of law, we submit that under well-established authority the interpretation placed upon the statute in the case at bar is plainly wrong. The cornerstone of our argument is that the statute does not forbid all dissemination of information relating to contraception, that it recognizes that under certain circumstances the imparting of such information is legal. We contend, furthermore, that if the statute is interpreted to ban the dissemination of all information with regard to birth control, it would violate that portion of the First Amendment to the Constitution which guarantees freedom of speech and of the press. Appellant contends that the subject of birth control is one concerning which the public is entitled to be informed and that no program of public health can ignore it. Therefore, it is important that persons who may lawfully use methods of contraception should have available to them information with regard to the various methods which may be employed and the various products on the market. Whatever might be the situation with regard to indiscriminate circulation of a pamphlet of this character, appellant contends that the

method of distribution adopted by it was a reasonable one. No attempt was made to show that this method lent itself to abuse.

Judge Goldsborough, who heard the motion to dismiss, gave no consideration to these various contentions. He stated from the bench that he would interpret the statute literally and that so interpreted the pamphlet came within its terms. He wrote no opinion.

Statute Involved

Section 334 of Title 18 of the United States Code Annotated (Act of March 4, 1909, c. 321, as amended by Act of March 4, 1911, Chap. 241, Sec. 2) provides:

"Mailing obscene matter: Every obscene, lewd or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication, of an indecent character, and every article or thing designed, adopted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use, and every article, instrument, substance, drug, medicine or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose, and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed, and every letter, packet, or package or other mail and matter containing any filthy, vile or indecent thing, device or substance, and every paper, writing, advertisement or representation that any article, instrument, substance, drug, medicine or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent

or immoral purpose, and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine or thing, is hereby declared to be non-mailable matter and shall not be conveyed in the mails, or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, or shall knowingly take or cause the same to be taken from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. The term 'indecent' within the intentment of this section shall include matter of a character tending to incite arson, murder or assassination."

Statement of Points

1. The Court below erred in holding that the complaint did not state a cause of action.

Summary of Argument

I. The limited circulation of the pamphlet here in question is not prohibited by law.

II. Any attempt to restrain the limited circulation of the pamphlet here in question would violate the First Amendment to the United States Constitution.

POINT I

The limited circulation of the pamphlet in question is not prohibited by law.

The law under which the pamphlet was barred from the mails is § 334 of Title 18 of the United States Code, quoted above.

This statute makes it a criminal offense to mail obscene publications and also any kind of writing which gives information as to where contraceptive articles may be obtained. It is settled, however, that the statute was not intended to be as all-embracing as its language would indicate. The subject has been reviewed in 50 Yale Law Journal 682, where it is stated that the debates in Congress disclose "contraceptives were included to the extent that they might be subjected to immoral use." This summary is confirmed by numerous judicial interpretations. Some of these interpretations have arisen under §334, others under similar provisions of § 396, which deals with interstate shipments by common carriers, and some of them under the analogous provisions of the Tariff Law.

The most recent case is *United States v. Nicholas*, 97 F. 2nd 510. There the Circuit Court of Appeals for the Second Circuit said:

"We have twice decided that contraceptive articles may have lawful uses and that statutes prohibiting them should be read as forbidding them only when unlawfully employed. *Youngs Rubber Corporation v. C. I. Lee & Co.*, 2 Cir., 45 F. 2nd 103; *United States v. One Package*, 2 Cir., 86 F. 2nd 737. See also *Davis v. United States*, 6 Cir., 62 F. 2nd 473. Contraceptive books and pamphlets are of the same class and those at bar were therefore lawful in the hands of those who would not abuse the information they contained."

In the *Nicholas* case the Court laid down the rule that books and pamphlets dealing with the subject of birth control and contraception could be sent to persons lawfully entitled to receive them. It held that an editor was entitled to receive copies of a magazine for distribution subject only to an objection on a showing that he had misused his right to distribute the magazine to persons entitled to receive it. So in the case at bar we submit that plaintiff had the right to distribute the pamphlet to persons applying for it on a certification that they had been advised by their physicians to practice contraception.

There was here no showing by the Post Office Department that the pamphlet was in fact distributed to persons not entitled to receive it. Consequently it cannot be claimed that the pamphlet should be barred from the mails because of any abuse in the manner of its distribution. Plaintiff has made effort to see to it that only married persons who have been advised by their doctors to prevent contraception should receive the pamphlet. In the absence of proof that there has been substantial misrepresentation by applicants for the pamphlet, we submit there is no basis for banning the pamphlet from the mails.

The doctrine of the *Nicholas* case rests on the two cases cited in the above quotation. In the first of these, the *Youngs* case, the defendant in a suit for trademark infringement in connection with contraceptive material advanced the claim that the merchandise could not be legally sent through the mails and therefore there could be no infringement. The Court rejected this contention and pointed out that it could not be supposed that Congress intended to prevent "a proper medical use of products or other articles merely because they are capable of illegal uses." The Court noted that although certain books might be barred from the mails as obscene if sent to the general public, yet it was well settled that books of such character could be sent to or by physicians for proper purposes, citing, among other cases, *United States v. Dennett*, 39 F. 2nd 564. In the case of *United States v. One Package* the Court held that the provisions of the Tariff Act (19 U. S. C. 1305), practically identical with those of the Criminal Code, did not prevent the importation of contraceptive materials by a physician.

The same rule was adopted by the Circuit Court for the Sixth Circuit in *Davis v. United States*, 62 F. 2nd 473.

We submit, therefore, that the courts have so interpreted the statute that it must be read as though it contained the precise words that the mailing is prohibited only if done with an improper purpose. No such improper purpose

can be attributed to plaintiff. The pamphlet is a sober, plain statement of facts and opinion. It is not designed to nor can it cause any impairment of morals. It has no salacious appeal of any kind whatever. The sole purpose of the distribution was to provide persons lawfully entitled thereto with information concerning the use and procurement of articles in common use which are legally bought and sold throughout the country. It is submitted that no such publication comes within the intent of the statute.

In this connection we wish again to call attention to the article in the Yale Law Journal which has summarized the social benefits resulting from a wise use of contraceptives, in part possible because of the reasonable judicial interpretation of the statute to which we have referred:

“By permitting medical use of contraceptives, the federal courts have removed the impediment to vast improvements in public health standards threatened by archaic national legislation. Both maternal and infant welfare may demand intelligent child spacing and postponement of pregnancies until women are physically fit to undertake them. The appalling annual losses of life and health among women who resort to abortion should be reduced. That birth control is an efficacious method for achieving these benefits is attested by the records of the charitable clinics as well as the conspicuous success of state-sponsored clinics in North and South Carolina and abroad.”

We believe that the pamphlet here in question can be of benefit in the same way and that its distribution for non-profit purposes is not banned by law. That being so, the order of the Postmaster General was without foundation and must be set aside.

POINT · II

Any attempt to restrain the limited circulation of this pamphlet would violate the First Amendment to the United States Constitution.

The First Amendment to the Constitution prohibits Congress from passing any law abridging freedom of speech or of the press. It cannot lightly be supposed that Congress intended in any way to infringe upon this provision of the Constitution when it made criminal the mailing of certain kinds of material or when it authorized the Postmaster General to ban such material from the mails.

In considering the constitutional question here posed, there are two public interests which must be weighed: the public interest against the distribution of material which may cause positive harm to the state; the public interest in the widest possible dissemination of information which will enable the public to lead better and fuller lives. We submit the pamphlet here in question falls into the second class and not into the first and is, therefore, within the constitutional protection.

There can be no doubt, of course, that there is a great public interest in all questions relating to the conception and bearing of children. The medical profession is vitally interested in the proper dissemination of birth control information and in the proper use of materials designed to permit birth control. There is extensive literature on the subject, some of which we are listing in a supplement to this brief. The medical profession recognizes the danger of pregnancy to many women suffering from a great variety of diseases and the need that women suffering from such diseases receive careful medical advice with regard to bearing of children. The American Medical Association has appointed committees to study this subject. State public health services in several states, notably North Carolina, South Carolina and Alabama, have sponsored

clinics dealing with the subject. In other states such clinics have also been established under private auspices.

Especially pertinent is the article, "Conception Control", by Dr. Dickinson, published in the Journal of the American Medical Association for December 18, 1943 at pages 1043-1047. This article in many ways parallels the pamphlet which is the subject of this litigation. The article discusses the various methods of contraception which are in use, it contains criteria for the acceptability of the products designed to make contraception possible and it specifically refers, with apparent approval, to a few products, giving their names and places of their manufacture. Are we to suppose that the Post Office contends that Congress intended to ban this article from the mails or that it had constitutional power to do so? We note that this article does not make unfavorable comments concerning any particular commodity, whereas the pamphlet involved in this appeal does. Surely that cannot be a basis for different treatment.

We are taking the liberty of handing to the Court copies of the number of the Journal of American Medical Association containing the article described in the last paragraph, as well as copies of other periodicals containing similar articles. If these can properly be sent through the mails, as, of course, they all were, it is impossible to see on what basis appellant's pamphlet could be excluded.

That the public buys contraceptive material in large quantities cannot be doubted.* That it is entitled to information with regard to the character and quality of the products which it buys must be conceded. Some of the dangers arising from the indiscriminate purchases by the public were alluded to in an article in Fortune magazine for November, 1938, called "The Accident of Birth". Pub-

* Indeed, despite the restrictions on the use of rubber due to the war, the War Production Board has permitted the manufacture of contraceptive materials, both for men and women, at 100% of their 1940-1941 production. (See War Production Board Supplementary Order No. M-15b.)

lic authorities indeed have recognized the need of the people for protection against some of the more unscrupulous manufacturers of these articles. Thus the Federal Trade Commission has instituted proceedings against certain manufacturers; the Food and Drug Administration of the Department of Agriculture has seized and condemned defective material.

One instance may suffice. The pamphlet, page 10, calls attention to the product Zonite. This is listed as being "potentially dangerous". The Federal Trade Commission has charged that the advertisement of this product was false insofar as it claimed that the product was harmless (see F. T. C. complaint docket 4755).

It is interesting to note, moreover, that various of these products are regularly advertised in catalogs of mail order houses, such as Sears, Roebuck and Montgomery Ward; for instance: Zonitors and Norforms, referred to at page 9 of the pamphlet; Ortho-Gynol and Koromex, referred to on page 30 of the pamphlet.

In the light of the foregoing we submit that Congress could not constitutionally forbid the dissemination of a pamphlet, such as the one here in question, to persons presumptively entitled to receive the information. For this pamphlet contains information only. It advocates no course of conduct. It is an analysis of the methods available and of the materials offered on the market. It points out the dangers of certain methods and materials. The pamphlet indicates the extent to which certain manufacturers claim in their advertisements more than they are justified in claiming.

It should be pointed out, moreover, that the pamphlet does not indicate how or where particular products may be obtained—for that there is no need since the products are widely advertised and often are easily accessible in drug stores. The report does, however, mention certain products by name so as to point out to the prospective purchaser the extent to which the products do in fact perform the functions claimed for them by their manufactur-

ers, the extent to which their use may be harmful and even dangerous.

It is clear, therefore, that the subject dealt with in the pamphlet is one concerning which the public is entitled to be informed, which Congress could not entirely forbid the dissemination of. We suppose that not even defendant would contend that physicians could be forbidden to receive information of the character here involved or transmit the same to their patients. The question in the case, therefore, narrows itself to this: Can Congress constitutionally prevent a person, who has been advised by his physician to use contraceptive materials, from obtaining through the mails information of value to him in determining what contraceptive material to use? We submit that the question answers itself.

So we are not contending that the statute under which the Postmaster General has acted is unconstitutional. We are contending merely that to apply the statute to the pamphlet here in question would be unconstitutional. In that connection we wish to call the Court's attention to the case of *Scientific Manufacturing Co., Inc. v. Federal Trade Commission*, 124 F. 2d 640, where the Circuit Court of Appeals for the Third Circuit recognized that there was a constitutional right to express an opinion with regard to the quality of articles of merchandise.

We believe that the statement of the Supreme Court in *Thornhill v. Alabama*, 310 U. S. 88, at page 102, fits the particular circumstances of this case:

"Freedom of discussion, if it would fulfill its historical function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Surely members of society who have been advised by their physicians to use contraceptive materials are entitled to information with regard to the character and quality of the materials advertised in the market. It is suitable and proper that a non-profit consumers' organization, such

as this plaintiff, should furnish such information. Plaintiff manufactures no products, has no financial interest in the manufacture of products. Its sole concern is to inform the public. That function should be protected by the Constitution.

CONCLUSION

We submit that the statute under which the Postmaster General acted may not be so interpreted as to permit the banning from the mails of the pamphlet here in question to the limited group to which it has been distributed and that if so construed the statute would be unconstitutional. Therefore the complaint states a cause of action and the judgment of dismissal should be reversed.

Respectfully submitted,

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SUPPLEMENT

Journal of Contraception, p. 124, Vol. II, #6-7, June-July, 1937.

Maternal Mortality in South Carolina, July 1, 1936, June 30, 1937. *Report of Committee on Maternal Welfare*. South Carolina Medical Association, 1938.

The Natural History of Contraception, Chaps. IV and V, Oxford University Press, 1939, New York.

A Health Department Birth Control Program, *American Journal of Public Health*, p. 253, Vol. 29, #3, March, 1939, American Public Health Association, New York.

The Journal of Contraception, Vol. IV, #6, July, 1939, New York.

Birth Control Information through Public Health Clinics favored in survey, *American Institute of Public Opinion*, January 23, 1940.

Maternal Mortality in South Carolina, July 1, 1939, June 30, 1940.

Studies in Childbirth Mortality, 11. Age and Parity as Factors in Puerperal Fatality, *Public Health Reports*, 55: 1195, July 5, 1940.

Abstract published in Human Fertility prior to publication in full in medical journal, pp. 142, 143, *Human Fertility*, Vol. V, #5, October, 1940, Baltimore.

Report of the Committee on Maternal Welfare, South Carolina Medical Association, 1941.

"Some Observations on the Contraceptive Behavior of Abortion Patients," *Human Fertility*, Vol. VI, #2, April, 1941, Baltimore.

Pennsylvania News, news letter of the Pennsylvania Federation for Planned Parenthood, May-June, 1941, Philadelphia.

A State Program for Planned Parenthood in Alabama, p. 129, *Human Fertility*, Vol. VI, #5, October, 1941, Baltimore.

The Undeveloped Medical Aspects of Human Reproduction, *National Committee on Maternal Health, Inc.*, 1942.

Report of the Council on Pharmacy and Chemistry, *Journal of the American Medical Association*, Vol. 118, #8, February 21, 1942, Chicago.

Information Service, Planned Parenthood Federation of America, Inc., March, 1942, New York.

"Planned Parenthood as a Public Health Measure for the Negro Race," *Human Fertility*, pp. 7-10, Vol. 7, February, 1942, Baltimore.

"Contraceptive Clinic and Preventive Medicine," *Human Fertility*, pp. 1-6, Vol. 7, February, 1942, Baltimore.

"Fertility and Contraception in Puerto Rico," *Puerto Rico Journal of Public Health and Tropical Medicine*, pp. 3-52, Vol. 18, September, 1942, Columbia University Press, New York City.

Report of a Birth Control Clinic After Two Years of Operation, *North Carolina Medical Journal*, pp. 501-503, Vol. 3, September, 1942, Winston-Salem.

"Birth Control Services in the United States," *Human Fertility*, pp. 86-88, Vol. 7, June, 1942, Baltimore.

"Birth Control Service Among Urban Negroes," Study Conducted by the Department of Health, City of Nashville, *Human Fertility*, pp. 97-101, Vol. 7, August, 1942, Baltimore.

"Place of Child Spacing in Industrial Hygiene Program," *Human Fertility*, pp. 163-166, Vol. 7, December, 1942, Baltimore.

Report of Sub-Committee on Birth Control of the National Medical Association, *Journal of the National Medical Association*, pp. 25-27, Vol. 35, January, 1943, New York.

"Planned Parenthood in a War Year," *Human Fertility*, pp. 1-4, Vol. 8, March, 1943, Baltimore.

"Medical and Biological Aspects of Birth Control: A Scientific Case Against Rigid Legal Restrictions on Medical Advice," *Clinics*, pp. 1598-1611, Vol. 1, April, 1943, Philadelphia.

"Control of Conception as a Public Health Responsibility," *Mississippi Doctor*, pp. 1-7, Vol. 21, June, 1943, Booneville, Mississippi.

Contraceptive Service of George Washington University School of Medicine: Study of 2000 Cases, *Human Fertility*, pp. 56-58, Vol. 8, June, 1943, Baltimore.

"Planned Parenthood as a Health Measure," *Journal of the National Medical Association*, pp. 141-142, Vol. 35, July, 1943, New York.

"Importance of Birth Control Clinics in Wartime," *Medical Press and Circular*, pp. 109-111, Vol. 210, August 18, 1943, London.

"Conception Control," *Journal of the American Medical Association*, Vol. 123, No. 16, December 18, 1943, Chicago.

APPENDIX

COMPLAINT

District Court of the United States

FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U. S., INC.,
10 East 40 Street,
New York, New York

Plaintiff,

against

FRANK J. WALKER, Postmaster General
of the United States,
Defendant.

Civil Action 21620

To Enjoin the
Postmaster
General
from Banning
Attached Material
from the Mails.

Consumers Union of U. S., Inc., by its attorneys, Osmond K. Fraenkel, Abraham J. Isserman and Paul J. Kern, shows to this Court and alleges:

1. That the above plaintiff is a membership corporation, organized not for profit under the laws of the State of New York, incorporated in the State of New York in the year 1936.

2. That the business of the above plaintiff is the testing, and analyzing of the quality, of merchandise offered generally for sale, and the distribution of information concerning such quality to its membership through periodical and other publications.

3. That Consumers Union of U. S., Inc., does not manufacture or sell any commodity or product whatsoever except the service to its members above described.

4. That Consumers Union of U. S., Inc., hereinafter referred to as "Consumers Union", issues monthly reports

COMPLAINT

District Court of the United States

FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U. S., INC.,
10 East 40 Street,
New York, New York

Plaintiff,

against

FRANK J. WALKER, Postmaster General
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Defendant.

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2. That the business of the above plaintiff is the testing, and analyzing of the quality, of merchandise offered generally for sale, and the distribution of information concerning such quality to its membership through periodical and other publications.

3. That Consumers Union of U. S., Inc., does not manufacture or sell any commodity or product whatsoever except the service to its members above described.

4. That Consumers Union of U. S., Inc., hereinafter referred to as "Consumers Union", issues monthly reports

having a circulation of fifty-two thousand (52,000) copies per month, and weekly reports having a circulation of forty-three thousand (43,000) copies per week.

5. That in 1937 Consumers Union issued a special report known as "Report on Contraceptive Materials", which was sold to about 30,000 members of Consumers Union in its original edition of 1937 and revised edition of 1939. A copy of this report is annexed as Exhibit A.

6. That the above report by Consumers Union did not advise the use of contraceptive materials, nor describe the method by which they should be used, but merely analyzed the quality of the various materials available for public sale on a comparative basis.

7. That Consumers Union did not sell or distribute any copies of the aforesaid report on contraceptive materials except to members upon a statement duly signed by the recipient, stating that he or she was married, and had been advised by a physician to use contraceptives. The specific statement so required follows:

"I am married and use prophylactic materials on the advice of a physician.

Signature....."

That in cases where the above statement was not signed the report was not distributed and that remittances unaccompanied by the above signed statement were returned.

8. That many contraceptives openly and publicly sold in the United States are either inferior in quality or either dangerous or inefficient for use. It was the purpose of Consumers Union in issuing said report to enable its members who were properly using such commodities to make a proper choice of such materials.

9. That the contraceptive materials referred to in the aforesaid report are publicly and legally sold throughout the United States and, upon information and belief, the volume of sales of contraceptives in the United States approximates \$250,000,000 per year.

10. That the aforesaid report on contraceptive materials was banned from the mails by letter of May 16th, 1941 from Albert Goldman, Postmaster at New York, New York, under Section 598, Postal Laws and Regulations, 1932 (copy of said letter is attached and marked "Exhibit B").

11. That the distribution of the aforesaid report on contraceptive materials through the mails does not in any respect violate the provisions of Section 334, Title 18 of the U. S. Code.

12. That following the above letter of May 16, 1941 from Albert Goldman, Postmaster, banning the aforesaid report from the mail, a conference was held with Vincent N. Miles, Solicitor of the Post Office Department, and briefs were filed, regarding the mailability of this report, after which the Post Office Department made final the ban on the mailability of the aforesaid report, solely under Section 334, Title 18 of the U. S. Code, by letter under date of November 23, 1942, from Vincent N. Miles, Solicitor of the Post Office Department, which is attached hereto and marked "Exhibit C".

13. That the action on the part of the Post Office Department is arbitrary, capricious and unwarranted. That such action exceeds the authority of the aforesaid department under the statutes in such cases made and provided, and violates plaintiff's rights under the First Amendment to the Constitution.

14. That plaintiff has no adequate remedy at law.

15. Plaintiff claims that the Court has jurisdiction under Title 28 of the U. S. Code, Section 41, paragraph 16, and also under Section 41, paragraph 1 of the same, in that the controversy here involved attacks the constitutionality of a law of the United States, and is between persons of diverse citizenship, and involves an amount in excess of Three thousand dollars.

WHEREFORE, your Petitioners respectfully pray that this Court shall issue a writ permanently enjoining the defendant Postmaster General and those exercising authority under him from banning or refusing to accept for mailing the aforesaid report on contraceptive materials, and for such other and further relief as the Court in its discretion may see fit to grant.

Yours, etc.,

OSMOND K. FRAENKEL,
ABRAHAM J. ISSERMAN,
PAUL J. KERN,

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Exhibit C

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington

November 23, 1942.

Mr. Abraham J. Isserman,
Isserman, Isserman & Kapelsohn,
Counsellors at Law,
Federal Trust Building,
Newark, New Jersey.

My dear Sir:

I have your letters of October 26 and November 6, 1942, with further reference to the ruling of this office concerning the mailability of a report on "Feminine Hygiene & Prophylactic Materials" issued by the Consumers Union, 17 Union Square, New York, New York.

After careful consideration of your memorandum in the matter, this office is of the opinion that it has no authority to waive the provisions of Section 334, Title 18 U. S. Code, which has already been the subject of judicial amendment by the Federal Courts. Consequently, no change in the ruling of the Department with respect to this material appears to be warranted.

Very truly yours,

VINCENT M. MILES
Solicitor.

MOTION TO DISMISS

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF UNITED STATES INC.,
Plaintiff,

v.

FRANK J. WALKER, Postmaster General
of the United States,
Defendant.

Civil Action
No. 21,620

MOTION TO DISMISS

Comes now the defendant in the above-entitled cause, by his attorney, and respectfully moves this Court to dismiss the complaint for the following reason:

1. The complaint fails to state a cause of action upon which relief may be granted.

EDWARD M. CURRAN,
United States Attorney.

DANIEL B. MAHER,
Assistant United States Attorney.

JUDGMENT AND ORDER APPEALED FROM

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF UNITED STATES INC.,
Plaintiff,

v.

FRANK J. WALKER, Postmaster General
of the United States,
Defendant.

Civil Action
No. 21,620

ORDER GRANTING MOTION TO DISMISS

Upon consideration of the motion to dismiss filed in this cause by the defendant herein, and after hearing the argument of counsel in open court, and the court being fully advised in the premises, it is by this court this 21st day of January, 1944;

ADJUDGED, ORDERED and DECREED as follows:

1. That the motion to dismiss, filed by the defendant be and the same hereby is granted.

T. ALAN GOLDSBOROUGH,
Justice.

BRIEF FOR APPELLEE

United States Court of Appeals

DISTRICT OF COLUMBIA

APRIL TERM, 1944

No. 8704

CONSUMERS UNION OF U. S., INC., APPELLANT

v.

FRANK J. WALKER, POSTMASTER GENERAL OF THE UNITED
STATES, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

EDWARD M. CURRAN,
United States Attorney,
DANIEL B. MAHER,
Assistant United States Attorney,
CHARLES B. MURRAY,
Assistant United States Attorney,
Attorneys for Appellee.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JUN 10 1944

Joseph W. Stewart

CLERK

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(i)

United States Court of Appeals

DISTRICT OF COLUMBIA

APRIL TERM, 1944

No. 8704

CONSUMERS UNION OF U. S., INC., APPELLANT

v.

FRANK J. WALKER, POSTMASTER GENERAL OF THE UNITED
STATES, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court granting a motion to dismiss the complaint of the appellant against the Postmaster General of the United States. The complaint (Appellant's App. 1) alleged that the appellant, plaintiff below, Consumers Union of U. S., Inc., is a membership corporation organized under the laws of the State of New York as a nonprofit corporation, whose business is to report to its members the result of tests and analyses of merchandise offered for public sale; that it issued a special report on contraceptive materials in 1937 and distributed it to some thirty thousand of its members in 1937 and 1939; that before a copy of the report was sent to a member, he or she must certify in writing, "I am married and use prophylactic materials on the advice of a physician;" that in May, 1941, the postmaster at New York, acting under instructions of the Postmaster General, banned this report from the mails and subsequent conferences between the Consumers Union representatives and the Post

Office Department were unavailing. The complaint recited that the banning of this report from the mails was arbitrary and relief by permanent prohibitory injunction was sought.

The report on contraceptive materials, which by reference is made a part of the complaint, consists of 31 pages of which pages 25 to 31, inclusive, are devoted to the appraisal as "acceptable" or "not acceptable" of various materials used for the prevention of conception. Pages 1 to 24, inclusive, treat of the various methods of preventing conception, their comparative effectiveness and the desirability of disseminating information of the kind set forth in the report.

SUMMARY OF ARGUMENT

Congress has committed to the Postmaster General of the United States the discretion to refuse the use of the mails to purposes condemned by law. By statute (18 U. S. C. 334) Congress has condemned and declared to be unmailable any circular or pamphlet giving information by what means conception may be prevented. That the circular here in question violates the letter of that statute is not to be questioned. The courts have interpreted into the statute, however, a reservation as to publications distributed to proper persons for lawful use. The Postmaster General was therefore bound to leave the mails open to this publication if it was being distributed to proper persons for lawful uses. In determining whether this publication was being or about to be so distributed, the Postmaster General undoubtedly had to use his judgment on a question of fact. The law is that under these circumstances his finding is conclusive upon the courts unless it appear to have been clearly wrong. In this case the publication was limited first to the membership of the Consumers Union, and secondly to those members who signed a certificate that they were married and using prophylactic materials on the advice of a physician. The membership of the Consumers Union was not conditioned on any qualification which would insure that the information or materials in question would be legally applied. The certificate required would depend for its effectiveness on the individual carefulness, intelligence and integrity of the lay person who made it. Under these circumstances the finding of the Postmaster General that the distribution of the information and

materials was not a proper one cannot be said to be clearly wrong. Therefore, a court of law ought not to interfere with this proper administrative finding.

ARGUMENT

The statute (18 U. S. C. 334) provides that,

Every obscene * * * book, pamphlet * * *
or other publication of an indecent character * * *
and every article or thing designed, adapted, or intended
for preventing conception, or producing abortion, or for
any indecent or immoral use * * * and every
written or printed card, letter, circular, book, pamphlet,
advertisement or notice of any kind giving information,
directly or indirectly, where, or how, or from whom, or
by what means any of the hereinbefore mentioned mat-
ters, articles, or things may be obtained or made * * *
or how or by what means conception may be prevented
or abortion produced * * *; and every paper, writ-
ing, advertisement or representation that any article,
instrument, substance, drug, medicine or thing may, or
can, be used or applied for preventing conception or
producing abortion, or for any indecent or immoral pur-
pose, and every description calculated to induce or incite
a person to so use or apply any such article, instrument,
substance, drug, medicine or thing, is hereby declared to
be nonmailable matter and shall not be conveyed in the
mails, or delivered from any post office or by any letter
carrier. * * *

It is plain that the publication here in question violated many of these provisions in letter. The question which is debatable is whether judicial interpretation of the statute has broadened it to the extent of rendering immune the distribution to a class not without limitation; and more particularly whether the limitation provided for in the instant case does place the distribution beyond the reach of the statute.

It is not to be doubted that the ruling of the Postmaster General ought not to be disturbed unless it was clearly wrong. In the case of *Bates & Gould Co. v. Payne*, 194 U. S. 106, the rule is stated as follows (p. 109):

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it, although they may have the power and will occasionally exercise the right of so doing.

See also *Smith v. Hitchcock*, 226 U. S. 53; *Masses Publishing Co. v. Patton*, 246 Fed. 24 (C. C. A. 2); *Anderson v. Patten*, 247 Fed. 282 (D. C. S. D. N. Y.).

It is undeniable that judicial interpretations of the statute, especially in the Second Circuit, have excluded from its operation the distribution to physicians and scientists whose use of the information and articles may be expected to conform to the belief held in respectable circles that the prevention of conception is in certain circumstances justified.

Davis v. United States, 62 F. (2d) 473;

United States v. Dennett, 39 F. (2d) 564;

United States v. Nicholas, 97 F. (2d) 510;

United States v. One Package, 86 F. (2d) 737;

Youngs Rubber Corp. v. C. I. Lee & Co., 45 F. (2d)

103.

But even these interpretations cling to the limitation that indiscriminate distribution is condemned. The question therefore is: Where is the distribution to stop? It does not appear that any decision has gone so far as to permit distribution to the prospective users directly. The appellant here argues that the means taken to limit the distribution were sufficient to bring the case within the decisions of the Second Circuit. But what are those limitations? They are simply a requirement that the prospective user certify that he or she is already using the materials under the direction of a physician and is a married person. Strictly construed, even this certificate does not exclude a use still generally held both unlawful and immoral. Aside from this, to expect the class which seeks the article to limit itself within proper bounds is an overdraft on human strength. The situation is not essentially different from a prac-

tice during Prohibition days. Interested companies (now suspected of having been organized for profit) distributed a bottled beverage of an alcoholic content well within the legal limit. Prominently displayed on the label was the pious warning not to do certain specified things with respect to the beverage, because to do so would certainly raise its alcoholic content well above the legal limit. The whole situation suggests the evolution of a law from effectiveness to ineffectiveness. The wedge has gradually widened the breach so that now there is seriously presented the question whether the distribution to the public generally is permissible so long as the distributor and the distributee claim to intend that it is for lawful uses only. It is beside the point to argue as did counsel for the appellant in oral argument of this case that the materials and the information are available at all drug stores and news-stands. The question presented is whether the mails shall be used to further the distribution. If that were not a further step in the procedure, the appellant would hardly have taken the trouble to bring its suit. If it is desirable that the use of the mails be kept current with the expansion of the other sources of information and materials, let it be done by Congress rather than by the courts. No one has dared to suggest that the present interpretation of the statute was that designed by Congress when it passed the law some sixty years ago. See concurring opinion of Augustus Hand in *United States v. Dennett*, 39 F. (2d) 564. If the Congress is unable or unwilling to keep apace of the recurring changes in opinion regarding matters of morals, it is submitted that the courts should not attempt to cure the omission.

At oral argument the attorney for the appellant presented to the court and called its attention to the following articles: The Journal of the American Medical Association, December, 1943, page 1043; Reader's Digest, July, 1943, page 85; and Fortune, February, 1938, page 83. These articles appear to be of the same general nature as the report excluded from the mails in the instant case. Counsel did not state his theory of what their distribution through the mails proved to his benefit in this case. Counsel for the appellee argued that the present case was not to be judged by what has been done or has not been done in other instances. At this point a Justice of

the Court inquired of counsel what the significance was as to the class of distributees. Whereupon counsel was forced to admit that in the case of the Reader's Digest and the Fortune magazine, the class was less limited than in the instant case.

These publications are not a part of the record in this case and the circumstances under which they were distributed through the mails are not known. Hence counsel for the appellee feels that he is at liberty to state the following: He has conferred with the Office of the Solicitor of the Post Office Department about the matter. The articles in the Fortune magazine and the Reader's Digest were not passed upon by the Department. Many articles in magazines not ordinarily devoted to kindred subjects are freely distributed before their existence is known. In the instant case a complaint was received by the Post Office Department and that is why the matter was investigated and ruled upon. Accordingly the instant case ought not to be judged by the articles of a like nature which may have escaped the ban of the Post Office Department. If the appellee's position in the instant case is sound then the other articles mentioned—and scores, no doubt, of still other articles which could be discovered by research—can be disposed of with the statement that they escaped by good chance a fate which they deserved.

CONCLUSION

It is respectfully submitted that the decision of the Postmaster General of the United States to whom Congress by law has committed the problem was based entirely, or for the most part, on a finding of fact; that the finding as made is not clearly wrong; and that therefore the action of the lower court in denying injunctive relief was proper and ought not to be disturbed.

Respectfully submitted.

EDWARD M. CURRAN,
United States Attorney,

DANIEL B. MAHER,
Assistant United States Attorney,

CHARLES B. MURRAY,
Assistant United States Attorney,
Attorneys for Appellee.

Exhibit A

Exhibit B

UNITED STATES POST OFFICE
New York, N. Y.

May 16, 1941.

Consumers Union
17 Union Square
New York, N. Y.

Gentlemen:

According to advice received from the Solicitor for the Post Office Department, certain advertising matter mailed by you offering a report on "Feminine Hygiene and Prophylactic Materials" to physicians, social workers and to married persons "who have been advised by their physicians to use contraceptives is unmailable under Section 598, Postal Laws and Regulations, 1932.

The report in question contains information relating to various preparations and devices for preventing conception and is also regarded as unmailable under the regulations mentioned.

You are, therefore, requested to see that no such matter is deposited in the mails in the future and I shall thank you to advise of your intention in this respect.

Sincerely yours,

ALBERT GOLDMAN
Postmaster.

S-jf

7130

